United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-1307

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

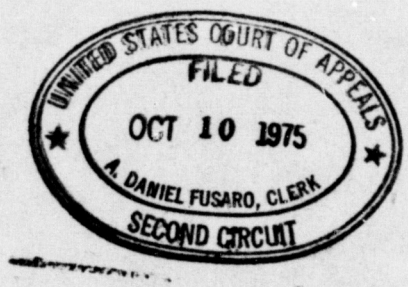
MICHAEL HALSEY BROWN,

Appellant.

Docket No. 75-1309

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether, because Count Two of the indictment did not charge a Federal crime, the conviction pursuant thereto must be reversed and the charge dismissed.

2. Whether, assuming arguendo that Count Two of the indictment charged a Federal offense, the instruction to the jury on that count was so inadequate that the conviction must nonetheless be reversed.

3. Whether the Government's introduction into evidence of irrelevant but inflammatory material denied appellant Brown of his Constitutional rights to due process and a fair trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lawrence W. Pierce) rendered on January 15, 1975, after a jury trial, convicting appellant Brown of knowingly attempting to assault, wound and offer violence to foreign officials and official guests at the headquarters of the United Nations by the use of a deadly and dangerous weapon, in violation of 18 U.S.C. §112(a) (Count Two); knowingly attempting to injure, damage and destroy real and personal property occupied by an international organization, in violation of 18 U.S.C. §970 (Count Three); and knowingly transporting in interstate commerce an explosive with the knowledge or intent that it would be used to kill, injure or intimidate one or more individuals or destroy a building, in violation of 18 U.S.C. §844(d) (Count Four).* Appellant Brown was acquitted of the charge of conspiracy to violate these statutes (Count One). After a court-ordered study pursuant to 18 U.S.C. §4208(c), the defendant was sentenced on April 17, 1975, to ten years' incarceration on Count Two, five years' incarceration on Count three, and ten years'

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*The indictment in this case is "B" to appellant's separate appendix.

incarceration on Count Four, the terms to run concurrently.

The Federal Defender Services Unit of The Legal Aid Society was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On August 7, 1974, five sticks of dynamite connected to a fuse, a packet of matches, and an extinguished cigarette were discovered in the meditation room at the United Nations Building in New York City. On September 10, 1974, appellant Brown was arrested at his home in Berea, Kentucky, and charged with the above-cited violations of Federal penal law in connection with the August 7 incident at the United Nations.

The evidence which the Government introduced at trial concerning the discovery of the dynamite and other materials at the United Nations was as follows:

At approximately 9:30 a.m. on the morning of August 7, 1974, United Nations security guard Granger unlocked the door to the meditation room in the United Nations complex and commenced a routine search of the interior of that room preparatory to opening the facility to the public (37-38*). In the course of his search, Granger discovered a taped

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*Numerals in parentheses refer to pages of the trial transcript.

bundle of five sticks of dynamite lying on the floor under the third row of stools in that room (39). Closer examination of the dynamite by Lieutenant Colonell of the United Nations security force revealed that it was attached to a fuse which led to a book of matches into which was also inserted a slightly burned but extinguished cigarette (45-46). Other Government testimony established that the dynamite sticks were found, upon testing, to contain dynamite powder (116-117) but no blasting cap (96). Explosives experts testified that dynamite normally requires a blasting cap for detonation (111) but that there was a possibility that the dynamite might detonate solely from the flame of a burning fuse (112). By tracing the identification information on the sticks of dynamite, the Government established that it had been manufactured in Alabama and that ninety per cent of this particular shipment had been retailed in Kentucky, the other ten per cent in Connecticut (190).

A Government fingerprint expert testified that a print which he found on the black tape surrounding the dynamite matched one of the fingerprints later taken from appellant Brown (390-415).

United Nations security officer Callender, who was assigned to guard the meditation room on August 6, 1974, the day prior to the discovery of the dynamite, testified that the dynamite and other materials had not been in the meditation room when he searched that room at 9:15 a.m. on

August 6. He could not recall how many persons entered the meditation room during that day, but did recall at one point observing a bearded caucasian male sitting cross-legged on the floor of the dimly lit room near where the dynamite was found the following morning (77-79). Callender did not recognize the defendant in the courtroom, and could not identify him as the man he had seen in the meditation room on August 6 (85). U.N. security guard Guthrie relieved Callender around mid-afternoon on August 6, and locked the door to the meditation room at approximately 4:00 to 4:30 p.m. (91). There was no evidence presented as to any security or surveillance of the meditation room between that time and Officer Granger's search of the room the next morning.

The Government also introduced evidence that the meditation room was located adjacent to the delegates' parking lot and beneath the delegates' lounge (54-58). The Government introduced no evidence that any delegates or official visitors were in either of those areas when the dynamite was placed in the meditation room, or that the dynamite, even if detonated, would have had sufficient explosive power to affect either of those areas.

The remainder of the Government's evidence related to appellant Brown's activities. William Stafford and his brother Larry, both residents of Lexington, Kentucky, testified that they first met appellant Brown when he came to Stafford's locksmith shop in December 1973. At that time

appellant Brown and the Staffords engaged in a conversation in which appellant stated that he had himself worked in a locksmith shop to obtain knowledge concerning locks (124-126). Thereafter, on July 4, 1974, the Stafford brothers were arrested on a charge of breaking and entering a department store (129). Two weeks later appellant Brown again came to their shop, stating that he had read about their arrest in the newspaper and could help them to get rid of the charge if they would help him on a job (130-131). He told them to call or come to see him if they were interested.

The following day the Stafford brothers went to appellant's home in Berea, Kentucky (132-133). According to the Staffords, at that meeting appellant explained to them that he had been hired by a retired Army colonel for $200 to destroy a bronze statue of the devil in the United Nations building (138). He allegedly stated that he would also like to destroy an altar in the meditation room at the United Nations (139). Brown then asked the Staffords if they knew where they could obtain some dynamite, to which they replied "No" (139). Brown then showed the Staffords a bag of white powder and told them that thermite was a chemical compound which could be used to destroy the statue, but that he would need something stronger to destroy the altar, which was marble (139). He stated that he was in the process of obtaining the chemicals with which to manufacture the thermite (149-150). According to the Staffords, appellant explained

that he would need them to shoot out a surveillance camera near the statue (140), to pick the locks if they entered the building at night (142), and, if necessary, to shoot at any guards who approached while Brown was planting the explosives (151). Brown suggested that they could enter the building at night by picking the locks, or during the day disguised as statue repairmen (142-143). They were to escape through the rear of the United Nations building by lowering themselves to FDR Drive, where they would commandeer a passing car (141). Brown allegedly said he wanted to this job to "get back in good" with an unidentified group (150).

The Government was also permitted, over the objection of defense counsel, to elicit testimony from the Staffords that appellant had told them of his activities as a member of a motorcycle club in California (127, 137, 178-179), and showed them photographs and newspaper clippings relating to those activities (137).

The Staffords decided after leaving Brown's home not to participate in the job he had described (167). William Stafford described his conversations with Brown to a neighbor of his, FBI Agent Gill (169), on August 9, 1974.

Evidence was also introduced to show that appellant Brown had ordered, and in some instances obtained, chemicals requisite to manufacturing thermite from several chemical supply companies (191-198).

A friend of Brown's, Harvey Whittemore, was permitted,

over defense objection, to testify that appellant asked him in 1973 to go with Brown to Washington, D.C., to destroy a statue with a battery-operated saw Brown was going to invent for the job. According to Whittemore, the trip never took place (257-270).

Stephan Maupin, a Defense Department employee and friend of Brown's, testified he had purchased from Brown a copy of Wheels of Rage, a book which allegedly described the activities of a motorcycle club of which Brown was a member (203). Maupin further testified that, in May 1974, appellant Brown invited him to go on a trip with Brown to Maine. Brown explained that he would be stopping along the way to visit friends and to "get involved" in a Jewish Defense League demonstration (205-208). Brown allegedly also told Maupin that he had the "goodies" to handle the demonstration and that they were "real concealed" (209). Maupin did not go on the trip with Brown, but after Brown's return in September 1974, Maupin asked him about the trip. Brown said he had "seen the people he wanted to see and done what he was going to do" (211), and that he had "newspaper clippings" (211).

An employee of the Commodore Hotel in New York City testified that records of the hotel showed that a Michael Brown registered at that hotel on August 5, 1974, and apparently checked out before 1:00 p.m. on August 6 (227-228). A Government handwriting expert testified that the writing

on the hotel registration card matched the handwriting samples taken from appellant Brown following his arrest (378-390).

James Madole, a resident of New York City, testified that appellant Brown telephoned him on August 3, 1974, and asked Madole to find a place for him to stay in New York City, and that Brown subsequently visited Madole at his New York apartment for about an hour on August 5 or 6 (235-241).

Joe Foster, an employee of General Telephone in Kentucky, testified that a collect call was made from Falls Church, Virginia, to appellant's home telephone in Berea, Kentucky, on August 3, 1974. That same day other calls from Falls Church to New York City and Hicksville, New York, were charged to appellant's home telephone. On August 5, 1974, a collect call was made from New York City to Mr. Brown's home phone. At 12:04 p.m. on August 6, 1974, a collect call was made from Darien, Connecticut, to Mr. Brown's home telephone. At a later date, unspecified in the record, a long distance call was made from Ellsworth, Maine, to Brown's home phone (216-226).

Huston Frantz, the brother-in-law of appellant Brown's wife, testified that he had been questioned by FBI agents, but had told them he never had any conversations with Brown concerning any bombing at the United Nations (245). He testified that he felt the FBI agents were coaching him to make certain incriminating statements about Brown (250). Charles

Middleton, one of the FBI agents who interviewed Frantz, testified that he had not asked Frantz to testify falsely (254).

Three of the FBI agents who participated in the arrest of appellant Brown testified as to the statements he made following his arrest. According to these agents, Brown, while being driven from his home to FBI offices in Lexington, Kentucky, stated that the agents searching his home could find some things which could convict him of something, that he had a book entitled Poor Man's James Bond and a Xerox copy of instructions for making a plastic explosive, and that if the agents searching his house found "ingredients," they would know that one "ingredient" was missing (281). He also asked if his brother-in-law Huston Frantz had turned him in, and stated that he had weapons belonging to Frantz in his home (281). Brown also allegedly stated, "If they find the scrapbook, I'm dead. There's enough in that to convict me whether or not I did it" (291). After appearing before the magistrate for arraignment, Mr. Brown stated, "It just goes to show you can't make a move against the Commies in New York City and expect to get away with it" (292).

Edmund Armento, the FBI agent who searched appellant Brown's home following his arrest, testified to finding there certain chemicals used in making thermite and a roll of fireworks fuse. Over objection by defense counsel, (316-349), the Government introduced into evidence various books

and papers found in appellant Brown's home for the purpose of showing "state of mind" and "intent" (352). The Assistant U.S. Attorney read to the jury from one of these books, entitled The Poor Man's James Bond, certain passages describing how "militants" obtain chemicals to make explosives (352-354). The Government then introduced into evidence a scrapbook found in appellant's home containing articles which "describe the activities of the Iron Cross Motorcycle Club in California" (354-355). A letter found in appellant's home dated May 3, 1974, and closing with "Best Wishes, Mike," was introduced because it contained a non-specific reference to abandoning "the dynamite idea" (356).((A copy of this letter is "D" to appellant's separate appendix). A booklet purportedly written by appellant Brown, entitled The Strength of Sampson, was introduced, and the Assistant U.S. Attorney read from it to the jury a passage which states:

> Have you ever wondered if the United States of America is prophesied anywhere in the Bible? If World Communism or the United Nations are spoken of in the Holy Scriptures?
>
> (357).

The Government also introduced another scrapbook found in appellant's home, which the Assistant U.S. Attorney described to the jury as containing news clippings "about the United Nations and explosives" (358). The Assistant U.S. Attorney then read both clippings to the jury. The first, a Bangor Daily News article, was described to the jury by the pro-

secutor as being captioned "Dynamite in Flames" (359). In fact, the article was captioned "Dynamite in sling." (A copy of this article is "E" to appellant's separate appendix). The court stenographer failed to record the prosecutor's reading of the rest of this article to the jury, noting only "(Mr. Schaffer read to the jury from the exhibit)" (359). Presumably he read the entire article, which describes the dynamite found at the United Nations as having a "30 yard killing radius," and quoted a Bomb Squad officer as saying that the dynamite "could have caused considerable damage if it had exploded. It probably would have had about a 30 yard killing radius." The prosecutor also read to the jury from a Daily News article concerning the discovery of the dynamite at the United Nations (359).

The Government then described the rest of the scrapbook to the jury as containing articles which contain the defendant's name and address and/or photograph (360). The prosecutor described one such article to the jury as being from the National Tattler, "... in the upper righthand corner a photograph with a caption, 'Brown studies work of late George Arlington Ward to aid his campaign'" (362).

Defense counsel, in arguing that Brown should be granted a directed verdict of acquittal on all counts, pointed out to the District Court that 18 U.S.C. §112(a), charged in two counts of the indictment, contained "no attempt provision" (418). Judge Pierce acknowledged this to be so, but the As-

sistant U.S. Attorney insisted:

> ... The law is clear, your Honor, in the Second Circuit, that an attempt is equally punishable with the completed act and that the statute need not provide separately in each case that an attempt is punishable.
>
> (420).

The District Court subsequently denied defense counsel's motion.

The defense presented no evidence.

The Court's Charge to the Jury

In his charge to the jury, Judge Stewart instructed, concerning Count Two of the indictment, as follows:

> ... Count 2 reads as follows:
>
> "The Grand Jury charges:
>
> "On or about the 6th day of August, 1974, in the Southern District of New York, Michael Halsey Brown, the defendant, unlawfully, wilfully and knowingly did attempt to assault, wound and offer violence to foreign officials and official guests at the headquarters of the United Nations by the use of a deadly and dangerous weapon."
>
> Before you can find the defendant guilty of the crime charged in Count 2, you must be convinced that the government has proved the following four elements beyond a reasonable doubt:
>
> 1. That on or about August 6, 1974, the defendant attempted to assault or wound or offer violence to persons present at the headquarters of the United Nations.
>
> * * *

In order to find the defendant guilty of the crime charged in Count 2, you must first find that he attempted to assault or wound or offer violence to persons present at the headquarters of the United Nations.

To attempt means wilfully to do some act in an effort to bring about or accomplish something the law forbids to be done.

Count 2 charges the defendant with an attempt to assault, wound or offer violence.

* * *

You are instructed that it is not necessary that the government prove that the defendant attempted to assault, wound and offer violence to officials at the United Nations. It is sufficient if you find beyond a reasonable doubt that the defendant attempted to do any one or more of the acts charged, that he attempted to assault or attempted to wound or attempted to offer violence to the persons in question.

In considering this element of the crime, I remind you that the government is not contending that the defendant did actually assault, wound or offer violence to anyone. It merely contends that he attempted to do so.

I instruct you that an attempt to assault, wound or offer violence is just as much a violation of the law as the actual acts.

The government has therefore satisfied the burden of proof as to this element if you find it has proven beyond a reasonable doubt that the defendant attempted to assault, wound or offer violence to persons at the United Nations.

* * *

In order to convict the defendant of the crime charged in Count 2, you must al-

so find that in attempting to assault, wound or offer violence to foreign officials or official guests, the defendant used a deadly or dangerous weapon.

* * *

Now, this completes my instructions with respect to Count 2 of the indictment. To summarize, before you can find the defendant guilty of the offense charged in that count, you must find that the government has proven beyond a reasonable doubt, one, that on or about August 6, 1974, the defendant attempted to assault or wound or offer violence to persons present at the headquarters of the United Nations; two, that such persons were foreign officials or official guests; three, that the defendant did so by means of a deadly or dangerous weapon; and four, that the defendant did so unlawfully, knowingly and wilfully.

(541-548).

Following its deliberations, the jury returned a verdict of not guilty on Count One, and guilty on Counts Two, Three, and Four of the indictment.

ARGUMENT

Point I

BECAUSE COUNT TWO OF THE INDICTMENT DID NOT CHARGE A FEDERAL CRIME, THE CONVICTION PURSUANT THERETO MUST BE REVERSED AND THE CHARGE DISMISSED.

Count Two of the indictment charged appellant Brown with violating 18 U.S.C. §112(a) in that he "... did attempt to assault, wound or offer violence to foreign officials and official guests at the headquarters of the United Nations by the use of a deadly and dangerous weapon." (Emphasis added). In accordance with this charge -- one of attempt to commit the crimes enumerated rather than their actual commission -- Judge Pierce instructed the jurors that they need only find an attempt,* which he defined as:

> ... wilfully to do some act in an effort to bring about or accomplish something the law forbids to be done.
>
> (542).**

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*See infra at 20 as to the insufficiency of this instruction on "attempt."

**The District Judge explicitly directed:

> ... The government has therefore satisfied the burden of proof as to this element if you find it has proven beyond a reasonable doubt that the defendant attempted to assault, wound or offer violence to persons at the United Nations.

On this element of the crime, the District Judge further cautioned the jurors that they need not go so far as to find that appellant Brown had successfully accomplished an assault, wounding, or offer of violence:

> ... [T]he government is not contending that the defendant did actually assault, wound or offer violence to anyone. It merely contends that he attempted to do so.
>
> I instruct you that an attempt to assault, wound or offer violence is just as much a violation of the law as the actual acts.
>
> (543).

In this, both the Judge and the indictment were in error:* an attempt to assault, wound or offer violence to a foreign official is not a Federal crime, and therefore the conviction must be reversed.

Title 18, United States Code, §112 contains no provision making criminal an "attempt" to do the substantive acts proscribed. In this respect, §112 is critically distinct from other Federal statutes which explicitly outlaw an "attempt" to do the acts prohibited therein.** See, e.g., 21 U.S.C. §846; 18 U.S.C. §§894(a)(1), 2113. Moreover, unlike the

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*So, too, the prosecutor, who argued against a motion for a judgment of acquittal stating that Federal law was "clear" that attempt to assault, wound or offer violence to a foreign official was a crime.

**Not only is §112 actually devoid of an "attempt" provision, there also exists the threshold question of whether an attempt to assault, which Judge Pierce here charged the jury, could ever constitute a crime. 1 Wharton's CRIMINAL LAW AND PROCEDURE, §72 (1957).

statutory schemes in various States (see, e.g., New York, N.Y. Penal Law §110.00; New Jersey, N.J.S.A. §2A:85-5; Vermont, 13 V.S.A. §9; Texas, V.T.C.A. Penal Code §15.01), the Federal law contains no general "attempt" provision. United States v. Padilla, 374 F.2d 782, 787 n.6 (2d Cir. 1967); Michael and Wechsler, CRIMINAL LAW AND ITS ADMINISTRATION, 584 n.3 (1940).

While Rule 31(c) of the Federal Rules of Criminal Procedure permits conviction of an attempt to commit an offense, such convictions are explicitly limited to situations, and none other, where the attempt is "an offense." The plain meaning of the language of the Rule, which, according to the Advisory Committee Notes, is a restatement of 18 U.S.C. former §565, is that an attempt to commit a crime is not punishable unless specifically provided within the substantive criminal statutes. Judicial applications of this rule uniformly accept this caveat. United States v. Padilla, supra, 374 F.2d at 787; United States v. Lucas, 6 F.2d 327, 328 (W.D.Wash. 1925); United States v. Patterson, 201 F.2d 697, 725 (S.D.Ohio 1912); see also United States v. Joe, 452 F.2d 653, 654 (10th Cir. 1971).

In United States v. Lucas, supra, 6 F.2d 327, the court quashed an indictment charging an "attempt" which was not provided for by statute. In United States v. Padilla, supra, 374 F.2d 782, and United States v. Joe, supra, 452 F.2d 653, both this Court and the Tenth Circuit, respectively, held

that a defendant could not be convicted of an "attempt," the lesser-included offense of the offense charged, because, in each case, there was no specific statutory provision making the "attempt" a Federal crime.

Because appellant Brown was charged with and convicted of acts which do not constitute crimes under the Federal law, his conviction must be reversed. This is so regardless of what this Court should determine as to appellant's convictions on Counts Three and Four of the indictment.* See, e.g., United States v. Maze, 414 U.S. 395, 397 (1974). Moreover, appellant Brown is entitled to a remand for re-sentencing in the event this Court were to affirm his convictions as to either or both crimes charged in Counts Three and Four of the indictment. United States v. Rivera, Doc. No. 75-1109, slip op. 4769, 4775 (2d Cir., July 14, 1975). The charge in Count Two concerning the endangerment of foreign officials by use of a deadly weapon is the most serious offense of which appellant was convicted. Remand for re-sentencing is therefore essential to ensure that the penalties imposed on the other counts in the indictment were not affected by the jury's finding of guilt on Count Two. United States v. Rivera, supra.

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*Appellant Brown was acquitted of the conspiracy charged in Count One.

Point II

ASSUMING ARGUENDO THAT COUNT TWO OF THE INDICTMENT CHARGED A FEDERAL OFFENSE, THE INSTRUCTION TO THE JURY ON THAT COUNT WAS SO INADEQUATE THAT THE CONVICTION MUST NONETHELESS BE REVERSED.

-A-

Having amply charged the jurors that a conviction did not require that an assault, wounding or offering of violence be consummated but that a mere attempt to assault, wound, or offer violence was sufficient, Judge Pierce then failed adequately to instruct the jurors as to what constitutes an "attempt." All the charge provided concerning an "attempt" was that an "attempt" is

> ... wilfully to do some act in an effort to bring about or accomplish something the law forbids to be done.

This supposed definition falls short of that provided in the legal texts and by judicial decision. 1 Wharton's CRIMINAL LAW AND PROCEDURE, §74, defines "attempt" as:

> an act directed to the commission of an intended crime, which act goes beyond mere preparation and is apparently suited for the intended purpose although it may be any act in the series of acts which would ordinarily result in the commission of the crime, and need not be the last or final step in the sequence.

See also Holmes, THE COMMON LAW, at 68 (1881).

In United States v. Coplon, 185 F.2d 629, 633 (2d Cir.

1950) (Hand, J.), cert. denied, 342 U.S. 920 (1952), this Court, quoting Mr. Justice Holmes, held:

> "Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree." [*]

Nowhere does the charge given in this case provide any indication that "any act" does not necessarily amount to an attempt. Similarly, the instruction fails to provide any standard or guidance by which to determine when actions exceed mere preparation and become an attempt.**

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*This distinction between "preparation" and "attempt" is recognized in states by statute or judicial decision. In Texas, for example, "attempt" is defined as

> ... an offense if with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.
>
> V.T.C.A., Penal Code §15.01.

See also State v. Moretti, 244 A.2d 499 (N.J.Sup.Ct. 1968); People v. Rizzo, 246 N.Y.334 (1927); State v. Hurley, 64 Atl. 78 (Vt. 1906).

**While the instruction given in this case appears to track the language of the definition provided in Devitt and Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §16.16 (1970), it is not thereby rendered sufficient for purposes of this case. The definition provided in §16.16 relies for authority on Spies v. United States, 317 U.S. 492, 499 (1943), which makes abundantly clear that the "attempt" with which the Supreme Court was concerned -- the attempt to evade income tax -- was distinct from the attempt charged here.

Since the jury instruction was deficient on an essential element of the crime, the conviction must be reversed despite the fact that the evidence produced by the Government may have been sufficient to support a conviction. Screws v. United States, 325 U.S. 91 (1975); United States v. Howard, 506 F.2d 1131, 1134 (2d Cir. 1974); United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972).

-B-

The District Judge's charge to the jurors on the elements of an "assault" was also inadequate:

> ... An assault is any hostile gesture or threat, coupled with an apparent present ability in the one making the gesture or threat to commit violent physical injury upon another person. An assault may be committed without actually touching, striking or committing bodily har[m] to another.
>
> (542).

This instruction and the rest of the court's charge omit any reference to a critical element of the crime of assault -- the intent to commit bodily injury. "Assault" is defined in common law as "an intentional, unlawful offer of corporeal injury to another by force.... [I]ntention to harm is of the essence." Black's LAW DICTIONARY, 147 (Revised 4th ed. 1968). That intention to harm or cause injury is an essential element

of this crime has repeatedly been confirmed by the Federal courts. United States v. Bamberger, 452 F.2d 696, 699 (2d Cir. 1971); United States v. Johnson, 462 F.2d 433, 426 (3d Cir. 1972); Burke v. United States, 400 F.2d 866, 868 (5th Cir. 1968), cert. denied, 395 U.S. 919 (1969); United States v. Marcello, 423 F.2d 993 (5th Cir. 1970); Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956).

The failure of the District Court to instruct as to this element of the crime was particularly significant since there was no evidence that appellant Brown had such an intent, as opposed to an intent merely to damage the United Nations building. His conversations with the Government witnesses indicated at most an intent to destroy an "altar" in the United Nations meditation room. Nor can such intent to injure be inferred from the act itself. The Government presented no evidence that the dynamite was placed in the United Nations building at a time when, even if detonated, it would have caused such injury. Consequently, the failure to instruct the jurors that they must find such intent before convicting appellant under Count Two was reversible error as to that count of the indictment.

Point III

THE GOVERNMENT'S INTRODUCTION INTO EVIDENCE OF IRRELEVANT BUT INFLAMMATORY MATERIAL DENIED APPELLANT BROWN OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The trial in this case was concerned solely with the specific charges that appellant Brown had been responsible for placing five sticks of dynamite in a room at the United Nations Building. Throughout the trial, however, the Government, over defense objections, presented to the jury evidence which was not relevant to the resolution of these issues, but served only to prejudice the jury against appellant or to sensationalize the crime for which he was accused.

Thus, a recurring Government theme at trial was appellant Brown's involvement with various motorcycle clubs, a factor which was totally irrelevant to the charges being tried. When Brown's involvement with motorcycle clubs was first mentioned, defense counsel objected, stating at one point that the references would be prejudicial and inflammatory and would bear no relation to the case (127, 179). The only justification given by the Government for introducing, and by the District Judge for admitting, such evidence was that it tended to show that the various witnesses had actually spoken with appellant (127-128). Thereafter, the prosecutor repeatedly elicited from various witnesses that

appellant Brown had discussed with them his "activities with respect to a motorcycle club when he lived in California" (136-137), and had showed them newspaper clippings pertaining to those activities and photographs of people on motorcycles (137, 178-179).

The prosecutor also elicited from various witnesses testimony as to trips they had taken with Brown to organize motorcycle clubs (201-202, 259, 265). Witnesses were permitted to testify, again over defense objection, as to a book entitled Wheels of Rage, which they stated was a description of the activities of a motorcycle club to which appellant Brown belonged (202-203, 258). Testimony was elicited from an FBI agent that appellant Brown admitted to the FBI that he had been president of the "Iron Cross Motorcycle Club from 1968 to 1970 in California" (289).

Finally, the Government introduced into evidence a scrapbook found in appellant's home whch the prosecutor informed the jury contained photographs and articles "which describe the activities of the Iron Cross Motorcycle Club in California" (355-356).

Through sensationalized news coverage, as well as fictional accounts and movies, such as Marlon Brando's The Wild Ones, the general public is suspicious of members of motorcycle clubs and tends to regard them as violence-prone and criminally inclined. Such prejudices were reinforced in this case by the reference to the Nazi iron cross in the

name of appellant Brown's motorcycle club, as well as to the title of the book Wheels of Rage, describing the activities of that club. The average juror would be forced to conclude that a club which had earned sufficient notoriety to merit a published account of its activities under such a title was not merely a weekend outing group, but rather a gang which engaged in violent criminal activity. Appellant Brown, however, was not on trial for his membership in that club, or for the activities in which its members may have engaged. Given the lack of any significant relationship between this evidence and the issues on trial, the principal effect of its introduction by the Government was to prejudice the jury against appellant Brown.

Similar prejudice accrued from the Government's insistence on presenting to the jury, over strenuous defense objection (316-330), excerpts from various books found in appellant Brown's home following his arrest. Thus, the Government read to the jury lengthy excerpts from The Poor Man's James Bond, describing how "militants" obtain the ingredients with which to manufacture explosives (351-354). It is contrary to the most basic principles of our law and our society for an individual to be held responsible in a criminal proceeding for the philosophy expressed in literature found in his possession. The Government's theory that the procedures described in this book were consistent with the procedures by which appellant Brown obtained certain chemicals is hardly

sufficiently probative to justify the presentation of such inflammatory material to the jury. Moreover, Judge Pierce's effort to minimize the prejudicial impact of this evidence by instructing the jorors that the evidence was not being introduced for the "accuracy" of its formula for thermite, but rather as evidence of appellant Brown's "state of mind and intent," would tend only to compel the jurors to assume that they could consider Brown's "state of mind" to be that of one of the "militants" described in this book and that he had adopted the book's radical philosophy.

The Government was also permitted, over the objection of defense counsel (356-357), to read to the jury an excerpt of a booklet written by appellant entitled The Strength of Sampson, which stated:

> Have you ever wondered if the United States of America is prophesied anywhere in the Bible? If World Communism or the United Nations are spoken of in the Holy Scriptures?
>
> (357).

The Government introduced this quotation to show a "linking" of communism and the United Nations in appellant's mind (336). Since those two entities are separated by a disjunctive, and since the United States of America is also mentioned on an equal basis in the quotation, such a "linking" is extremely questionable. The quotation contained no suggestion of violence or bombing. Its principal effect on the jurors was to convince them that appellant Brown may have had extremist

religious and political beliefs, a factor totally irrelevant to the issues being tried but highly prejudicial to appellant.

In addition to portraying irrelevant aspects of Brown's lifestyle and beliefs in an unfavorable light, the Government sensationalized the crime for which he was being tried. Thus, when the Government introduced another scrapbook found in appellant's home, rather than simply obtaining testimony that the scrapbook contained news clippings describing the discovery of dynamite at the United Nations, the Government insisted on reading the articles to the jury. The article in the Bangor, Maine, newspaper included statements that the dynamite found at the United Nations had a "30 yard killing radius," and quoted a Bomb Squad officer as saying that the dynamite

> ... could have caused considerable damage if it had exploded. It probably would have had about a 30 yard killing radius.
>
> (Appendix "E").

Although the District Court cautioned the jurors that these articles were not being introduced for the truth of their content, they comprised the only evidence introduced by the Government during the entire trial as to the destructive or "killing" capability of the dynamite. As such, it was impossible for the jurors to comply with Judge Pierce's instructions and blithely ignore the highly prejudicial impact of these assertions (United States v. Falley, 489 F.2d 33, 37-38 (2d Cir. 1973); United States v. Semensohn, 421 F.2d

1206, 1208 (2d Cir. 1970); see also Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion); United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970); United States v. DeSisto, 289 F.2d 833, 835 (2d Cir. 1961)), assertions which were not even subject to cross-examination by the defense.

Moreover, the Government advised the jurors that the caption of the Bangor Daily News article was "Dynamite in Flames," whereas in fact it was "Dynamite in sling," a reference to the sling used by the police to carry the dynamite out of the building. The sensational impact and resultant prejudice accruing from this misstatement are self-evident, particularly since the dynamite appellant was accused of planting at the United Nations was not detonated.

The admission of this irrelevant and highly inflammatory evidence was clearly improper. As this Court held, in United States v. Tomailo, 249 F.2d 683, 690 (2d Cir. 1957):

> ... [B]y receiving this mass of inadmissible, irrelevant and highly prejudicial testimony, the District Court permitted the prosecution to paint the defendant Tomailo as a bad man, associating with criminal companions, who would do almost anything.

See also United States v. Falley, supra, 489 F.2d 33; United States v. Reid, 410 F.2d 1233, 1226-1227 (7th Cir. 1969); Courtney v. United States, 390 F.2d 521, 528-529 (9th Cir. 1968); Moody v. United States, 376 F.2d 525 (9th Cir. 1967);

Thomas v. United States, 376 F.2d 564, 567 (5th Cir. 1967). By introducing the above-cited evidence in the present proceeding, the Government not only painted appellant Brown as a "bad man," but also improperly interjected aspects of his lifestyle, his reading material, and his philosophical and religious beliefs into the jury's deliberations. Moreover, by reading the news clippings to the jurors, the Government placed before them sensationalized allegations concerning the crime charged which were not substantiated by any competent evidence at trial and which were not subject to cross-examination. The resultant prejudice requires that appellant Brown's conviction be reversed and his case remanded for a retrial limited to the crimes already charged.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded with instructions that Count Two of the indictment be dismissed, and retrial granted as to Counts Three and Four; alternatively, Counts Three and Four should be remanded for re-sentencing.

Respectfully submitted,

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Certificate of Service

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.